

House International Relations and Economic Development Committee  
86<sup>th</sup> Texas Legislature  
Interim Charge 4 Request for Information

**Response from Texas Workforce Commission**

**Interim Charge 4:** Examine and report on policy proposals from business, labor, and other states that utilize portable platforms to address the growing number of independent contractors and employees in the "gig economy." Study the effects and implementation of the new rules adopted by the TWC related to the "gig economy."

On April 29, 2019, the Texas Workforce Commission (TWC) implemented Chapter 815 of the Texas Administrative Code, relating to Unemployment Insurance, Subchapter C, Tax Provisions, § 815.134(b). The purpose of the Chapter 815 rule change was to develop an employment status analysis for workers who use a marketplace platform's digital network to conduct their own independent businesses. Excluded from this employment status analysis were marketplace platforms regulated as Professional Employer Organizations and professional employer services under §91.001(14) and (15) of the Texas Labor Code; temporary employees and temporary help firms as defined in §201.011(20) and (21); governmental entities, not-for-profit organizations, and Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly exempted under any other state law. Also excluded were employers or employment as described in Texas Unemployment Compensation Act (TUCA) §§201.027, 201.028, 201.042, 201.047, and 204.009. This rule change did not apply to transportation network companies, as House Bill 100, passed by the 85<sup>th</sup> Texas Legislature, Regular Session, created regulations within Texas Occupations Code Chapter 2402.

TUCA (Chapter 201, Subchapter E) currently excludes from the definition of employment certain workers whose personal services may be performed under the control or direction of the contractor. Such workers may or may not be in employment under TWC's analysis for determining the employment status of workers, as set forth in TWC's Chapter 821 Texas Payday Rules §821.5, which is used in determining employment status for the purposes of unemployment insurance through §815.134. TUCA §201.041 tasks TWC with determining if the service of an individual "has been and will continue to be free from control or direction under the contract and in fact."

The employment status analysis is generally predicated on determining whether direction and control could exist in fact or in contract. Because marketplace platforms' business models are becoming increasingly prevalent in our economy, clarification, through rule, of how direction and control apply in these instances is needed as it applies to unemployment insurance.

The rule provides clarification of Rule 821.5 for the marketplace contractor business model. The rule provides a definition of "digital network", "marketplace platform", and "marketplace contractor". Further, the rules provide the conditions by which a marketplace contractor is not considered to be in employment for the purposes of the TUCA. Rule 815.134(b) condenses the factors contained in Rule 815.5 into nine conditions that apply for marketplace contractors. Rule 815.134(b)(2) requires that all nine conditions must be met before a marketplace contractor is not treated as being in employment for purposes of the TUCA. Marketplace contractors are considered to not be in employment under the following conditions:

- When all or substantially all of the payment paid to the marketplace contractor is based on the performance of services or on a per-job basis.

- The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third parties submitted through the digital network.
- The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform.
- The marketplace does not restrict the marketplace contractor from engaging in any other occupation or business.
- The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the platform's digital network.
- The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services.
- The marketplace contractor bears all or substantially all of the contractor's own expenses incurred while performing the service.
- The marketplace platform does not control the detail or methods for the services performed by the marketplace contractor by requiring the marketplace contractor to follow specified instructions governing the performance of services.
- The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.

Since the implementation of Rule 815.134, the TWC Unemployment Insurance Tax Department has not seen a significant impact resulting from this rule. There have been three cases where the rule was fully applied, resulting in one ruling of independent contractor status for one worker, one ruling involving 15 workers where Rule 815.134 does not apply, and one case that is still in the decision process.